

N.D.A.G. Letter to Paulson (Jan. 2, 1986)

January 2, 1986

Mr. Gerald S. Paulson
Assistant City Attorney
City of Emerado
Emerado, ND 58228

Dear Mr. Paulson:

Thank you for your letter of December 10, 1985, requesting an attorney general's opinion on several facts involving an advertisement for bids for snow removal issued by the City of Emerado. Your questions concern several events which occurred in the bidding process and the rescheduling of meetings of the city council. According to your letter, the subject matter of the contract in question the removal of snow. It is assumed that this contract is for services as opposed to the purchase of property and/or equipment.

It is important to note at the outset that North Dakota law does not require cities to call for bids in the contracting for services such as snow removal. We are unaware of any requirements for such bidding according to the ordinances of the City of Emerado. Assuming there are no such ordinances and given the fact that there are no statutory requirements for bids to be let, the general rule indicates that public policy does not demand that a municipal corporation advertise for bids and let contracts to the lowest bidder in arranging for such services. 64 Am. Jur.2d Public Works and Contracts § 36 (1972). Thus, in the situation described in your letter, it is assumed that the city arrived at the administrative decision to request bids for such services as opposed to taking action in compliance with statutory or ordinance requirements.

Your first question concerns North Dakota law as found in N.D.C.C. §48-08-09 and its impact upon a mayor who contracts for snow removal with the city. This particular statute prohibits the city council members from holding an office, position, or obtaining a salary from the city treasury. It does not in and of itself prohibit members of the council from becoming independent contractors with the city. It would appear that the individual providing services as described in your letter, fits the category of an independent contractor as opposed to an employee. Thus, we fail to see where this particular statute is applicable.

However, we do believe that municipal officers who enter into contracts with cities in which they have personal interests in such contracts must make disclosure of such facts. These requirements are found in N.D.C.C. §§ 40-13-05, 40-13-05.1. Your letter does not indicate whether or not the mayor did make the disclosure required by these particular statutes.

The next four questions you have posed concern the bid of the mayor and the fact that it was not submitted as requested by the request for bids and the apparent contract awarded to the mayor. You question whether these particular events should have been allowed to occur. As indicated previously, the bidding process involved in this matter was not required by North Dakota law nor, apparently, by the City of Emerado ordinance. Therefore, it is difficult for us to indicate the manner in which gratuitous bids should be handled by the entity calling for the bids. Instead, such matters are left to the discretion of the entity unless a specific statute is applicable.

We would point out the existence of N.D.C.C. § 44-08-01.1 which concerns bids called for by governing bodies of political subdivisions as required by law and "administrative decision." This statute requires designation of a time and place for the opening of bids and the purchase to be made from the bidder submitting the lowest and best bid meeting or exceeding the specifications called for. Although this statute is restricted to the bids solicited "for the purchase of personal property and equipment," we would recommend it as a standard by which to gauge the conduct of bids for matters other than the purchase of such property and equipment.

In the spirit of the intent of the legislature as expressed in N.D.C.C. §44-08-01.1, we would recommend that the bids be opened when they were advertised to be opened. Furthermore, bids not in the receipt of the entity by the deadline should not be eligible for opening or consideration by the governing body of the political subdivision. In other words, we would suggest that the bids should have been opened on November 4, 1985, and that the mayor's bid, as it was not received by this date, not be accepted. As N.D.C.C. §44-08-01.1 is not applicable to this factual situation, these conclusions are recommendations--not directives.

A final comment should be made as to the fifth question concerning the ability of the city council to rescind the contract awarded to the mayor and award it to one of the other bidders. We are unaware of any authority for the proposition that contracts awarded as a result of gratuitous bidding may be rescinded by the awarding entity where the entity now concludes a different procedure should have been followed. However, where the mayor has not complied with N.D.C.C. §§ 40-13-05, 40-13-05.1, where such statutes are indeed applicable, such occurrences would establish the basis for the rescission of a contract for failure to comply with applicable statutory provisions. 64 Am. Jur.2d Public Works and Contracts §38 (1972).

Your final question concerns the ability of the mayor to reschedule a regular meeting of the city council. North Dakota law, as found at N.D.C.C. §40-08-10, indicates that the city council shall hold its regular meetings at least once a month on or before the 15th day of the month as established by resolution or ordinance of the council. Furthermore, the statute allows an ordinance to be passed determining the manner in which special meetings may be called as well as the establishment of additional regular meetings. Nowhere in this statute is any authority provided to the mayor to postpone or reschedule meetings of the city council. Instead, such authority would have to occur as a result of an ordinance pursuant to this statute.

In reviewing a copy of the Emerado city ordinance regarding regular meetings of the city council which was provided with your letter, it is apparent that no authority has been provided to the Emerado Mayor to postpone or reschedule meetings of the city council. Thus, such action would have to be taken by the council as opposed to the mayor.

Sincerely,

Nicholas J. Spaeth

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